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SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOHN C. BROOKS, Commissioner of Labor
of the State of North Carolina,
Appellant,
v.
BURLINGTON INDUSTRIES, INC., et al.,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

APPELLEE'S MOTION TO DISMISS OR AFFIRM

BILL N. SLACK, et al.,
Petitioners,
v.
BURLINGTON INDUSTRIES, INC.,
Respondent

ON WRIT OF CERTIORARI TO THE U.S. COURT
OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

McNEILL SMITH
Counsel for Appellee and Respondent
Post Office Box 21927
Greensboro, NC 27420
(919) 378-1450

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Did the Court of Appeals and the District Court err in holding that Burlington's severance benefit policy is governed by ERISA, preempting state law?

2. Did the Court of Appeals and the District Court err in holding that Burlington was not arbitrary and capricious in not paying severance to the individual plaintiffs whose jobs were preserved - not eliminated as required by Burlington's established written policy - when its hosiery and socks divisions were sold as going concerns?

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NATURE OF THE CASE

The Commissioner's appeal concerns the scope of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001 et seq., as amended: does ERISA preempt the N.C. Wage and Hour Act, G.S. §95-25.1 et seq., which was amended January 1, 1980, to include severance pay for the first time?

The petition of the 200 salaried employees who are plaintiffs echoes the Commissioner's appeal but adds another issue: were their claims under ERISA correctly denied?

There was a full hearing in the district court on a complete record which included the depositions of each of the 200 plaintiffs, all the documents, and the testimony of defendants' officers and Director of Personnel Management who administered the company-wide severance plan. The plaintiffs declined any further

evidentiary hearing[1] and the district court held that (1) ERISA preempted state law and (2) Burlington's decision that the plaintiffs were not eligible under the terms of its plan because their jobs had not been eliminated was not arbitrary, capricious or unreasonable. The Court of Appeals affirmed.

Burlington Industries, Inc. (Burlington) sold its Socks and Hosiery Divisions to Kayser-Roth Corporation as going concerns. By agreement Kayser-Roth offered continuing employment to all but five employees. The plaintiffs accepted and continued their jobs under the new management. Employees not offered continuing employment received severance pay from Burlington according to its company-wide severance plan set forth in its Company Policy Manual to which all employees had

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[1] [Tr. of Hearing, Aug. 27, 1984, pp. 69-70].

access. Plaintiffs did not receive severance pay. Under the terms of sale their jobs were preserved, their salaries maintained at then present levels, and they performed the same work they had done for Burlington.

Burlington manufactures textiles. Its executive offices and many of its facilities are in North Carolina. Its merchandising offices are in New York. It has plants and offices in many other states. Plaintiffs are residents of North Carolina, Tennessee, Ohio, and Quebec, Canada. Their positions ranged from Division President to Clerk.[2]

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[2] Two other similar actions were brought by former employees of the Divisions. Gilbert, et al and Lillian Roberts, Commissioner of the Department of Labor of the State of New York v. Burlington Industries, Inc. on appeal in this court, Nos. 85-441 and 85-460, and Brooks v. Burlington Industries, Inc., Docket No. 7198, Roane County Tennessee Circuit Court, dismissed July 2, 1985 for failure to prosecute.

Burlington has had a written policy providing severance benefits for eligible employees since 1953. In 1974 Burlington embarked on a program of retrenchment. Anticipating many jobs would be eliminated, management revised its severance policy to provide substantial transition pay to salaried employees forced to find new jobs in the midst of an economic recession through no fault of their own. The 1974 revision, adopted unilaterally by management, was not the product of negotiations with the employees. It was set forth in a revised section of the Company Policy Manual available to all salaried employees through the supervisors, personnel managers, and department heads in every plant and office. The 1974 revision expressly stated that "job elimination" was a condition of eligibility for severance. Burlington's Director of Personnel Management who drafted the 1974 revision stated that the "job elimination"

requirement was intended to mean and has since been interpreted by Burlington as meaning that employees who actually lose a job, as opposed to those who undergo a change of management, are entitled to severance benefits. Officers of the company who handled the plaintiffs' grievances testified to the same understanding. In addition to the Policy Manual, many employees were also notified of the severance plan in the Policy Manual by a salaried employees handbook. First published in 1976, revised in 1978 and again in 1981, it contained highlights of Burlington's benefit plans and other matters. Employees were referred to their supervisors or personnel representatives if they had any questions and were advised that the policies were subject to change. Burlington also followed an "open door" policy, encouraging all employees to seek advice from supervisors, personnel managers and department heads concerning

any aspect of their employment, including the application of benefit policies in specific situations. When advising employees as to eligibility for benefits, management employees applied the policies set forth in the Policy Manual. The 1978 edition of the handbook specifically mentioned involuntary termination "due to job elimination" as a condition of eligibility for severance. The 1981 edition of the handbook added information on more subjects and some summaries, including the severance description, were shortened. Every plaintiff testified by deposition. Some plaintiffs received the 1978 handbook but not the 1981 handbook. No one who received a 1981 handbook noticed any difference in the section on severance benefits. It was undisputed that the plaintiffs had access to the Policy Manual where the severance policy was fully set out.

Burlington consistently applied the Manual and paid severance benefits to employees whose jobs were eliminated and denied severance benefits to employees whose jobs were preserved. When Burlington sold the Hosiery and Socks Divisions in 1982, it applied the severance plan in the same manner it always had and in accordance with the Policy Manual.

Burlington held meetings with its employees in October 1981 and went over the details of the impending sale: the Divisions were being sold as going concerns, Kayser-Roth would continue the business using Burlington's trade marks and trade names under license, Burlington would be completely out of the socks and hosiery business, and Burlington agreed not to hire any former employee for a period of six months after the sale. Kayser-Roth agreed to credit their new employees with all their time of service with Burlington. Employees were reminded

of the severance policy and told that severance benefits would be paid to all employees whose jobs were eliminated and that employees whose jobs were preserved would not receive severance benefits. After the initial announcement and in response to concerns expressed by its employees, Burlington extended the availability of severance benefits to employees who were involuntarily terminated by Kayser-Roth (other than for disciplinary reasons) during the first six months following their transfer to Kayser-Roth.

The testimony of Nadine Albright is typical of most of the plaintiffs. She received a handbook and remembered that job elimination was one of the requirements for severance pay. She read about severance pay in the Policy Manual and may even have computed her benefits from the tables in the Manual. She said the Manual is more detailed than the handbook and explained "about anything you would want

to know about the company." She never discussed severance pay with any management representative. She did not rely on the Burlington severance pay plan in making any employment decisions. In all her years at Burlington she never even thought about the divisions being sold. After the sale to Kayser Roth, she got a 6-7% raise.

The transfer of the Divisions occurred at midnight, January 3, 1982. Employees coming to work on January 4, 1982, went to work at the work stations and desks that had been theirs on the previous day. The Divisions continued to operate as going concerns, and there was no substantial displacement of employee functions due to the transfer. No plaintiff lost a day of work because of the sale.

Sometime after the sale some employees who had previously been stationed at Burlington's J. Spencer Love Center in Alamance County were relocated to a Kayser-Roth facility in Greensboro. In

individual cases, these employees received severance pay from Burlington if they were unable to continue in their employment with Kayser-Roth and applied to Burlington for severance pay on a discretionary, hardship basis.

After the announcement of the sale and application of the severance policy several employees, including some of the plaintiffs, appealed the decision through Burlington's grievance procedure. They met with three of the highest officials of Burlington who were designated as the President's Committee to hear the grievances. The committee explained to the employees that they would not receive severance pay because they were not eligible under Burlington's written severance policy because their jobs were not eliminated.

Following institution of this lawsuit by plaintiffs, there was some confusion at Burlington about whether Burlington would hire any of the plaintiffs if one should

apply. That confusion was eliminated when H. L. Quintana, Vice President for Personnel, issued a directive making it clear that any qualified plaintiff would be considered for employment. No plaintiff was ever denied employment because of his or her status as a plaintiff and plaintiffs conceded no one was known to have been penalized.

MOTION TO DISMISS OR AFFIRM

The appellee Burlington Industries, Inc. moves to dismiss the appeal or affirm the judgment of the Court of Appeals.

There is no basis for the appeal under 28 U.S.C. §1254(2). No state statute has been invalidated. The only issue on appeal is the construction of a federal statute: that is whether this particular employer's written severance benefit policy constitutes an "employee welfare benefit plan" under ERISA. [J.S.i.]

Alternatively, Burlington moves to affirm the judgment of the Court of

Appeals. The unanimous decisions of the courts below conform to the statute, the Secretary's regulations approved by Congress' 1980 amendments to the statute, and the decisions of five other circuits and numerous district courts.

A. There is No Conflict of Decisions.

Analagous decisions in the Second, Seventh, Eighth, Ninth and Eleventh Circuits and other decisions in the Fourth Circuit and many District Courts are cited in Burlington's Motion to Affirm in Gilbert et al v. Burlington, No. 85-441 and No. 85-460 at pp. 10-12.

The Second Circuit's decision in Gilbert, et al involves a similar holding on the identical severance benefit policy and involving the same sale of divisions by Burlington. The Second Circuit held that Burlington's policy was an ERISA "plan" and that the state law claims asserted by a separate group of former Burlington employees were preempted by ERISA.

Thus, at the present time at least six Circuits and numerous District Courts have decided the issue presented by this appeal in a like manner. Two Circuits have addressed the identical issue and have reached the same conclusion, based on the same reasoning, without a dissent.

B. There is No Substantial Federal Question.

The Commissioner argues that this Court must face "the task of giving a more precise definition of 'welfare benefit plan'" than either the statute or the regulations. [J.S.11] Burlington submits that that is not an appealable issue.

The Court of Appeals distinguished employee pension benefit plans from employee welfare benefit plans,[3] and

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[3] ERISA requires vesting and separate funding for pension plans but not welfare benefit plans. See 29 U.S.C. §1051(1), 1081(a)(1). Traditionally severance pay policies were unfunded arrangements providing wholly contingent benefits. Recognizing the effect the new

considered whether Burlington's severance pay provision, admittedly not an employee pension benefit plan,

> "constitutes an employee welfare benefit plan or a mere 'payroll practice' -- as defined by Department of Labor regulations 29 C.F.R. §2510.3-1. -- that falls outside the scope of ERISA." [A.10]

The Court specifically rejected the Commissioner's contention that the Secretary of Labor lacked authority to interpret the statute in the manner of the regulations to include severance benefits in the definition of "welfare plan," holding that Congress in 1980 by specific language confirmed the authority of the

(Footnote 3 continued)

law would have if they were treated as pension plans the Secretary of Labor, in 1975 and 1979, issued regulations that "an arrangement" providing severance benefits would not be treated as a pension benefit plan if the payments were not contingent upon retirement and if the total amount paid would not exceed twice the employee's annual compensation. 29 C.F.R. §2510.3-2(b). If a severance pay arrangement was not treated as a pension plan under this rule, it was nonetheless to be treated as an "employee welfare benefit plan" under the Act. 29 C.F.R. §1410.3-1(a)(3).

Secretary and approved his previously issued regulations under which

> "severance pay arrangements ... shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans." [A.12]
>
> [See 29 U.S.C. §1002(2)(B)]

Burlington's additional reasons for affirmance are set forth in its Motion to Affirm in Gilbert et al v. Burlington Industries, Inc., Nos. 85-441 and 85-460 at pp. 12-22.

WHY THE WRIT SHOULD NOT BE GRANTED

A. The Plan Administrator's Decision was Properly Reviewed: Was the Decision Arbitrary, Capricious or Unreasonable?

The Court of Appeals, affirming the District Court, held that:

> In reviewing determinations of claim eligibility under ERISA, we employ an "arbitrary and capricious" standard. [Citing cases from 3rd, 4th, 6th, 7th and 8th Circuits. A.32-33]
>
> * * *
>
> Where claim eligibility is involved, it is necessary to ensure that primary responsibility rests with administrators "whose experience is daily and continual, not with judges whose exposure is episodic and occasional." Berry, 761 F.2d at

> 1006. This objective holds true whenever consistent administration of a pension plan or welfare benefit plan covered by ERISA is at issue. Claim eligibility disputes, absent a finding that they have been resolved in an arbitrary or capricious manner, must remain with those who formulate and administer company plans and policies whether formally trustees or not. [Citing cases.] To vary the standards of judicial review for general asset welfare plans would only sow confusion in ERISA, which we decline to do. [A.33-34]

Plaintiffs attack this Standard of Review and its application here.

The prevailing standard is that a claims decision made by a plan administrator will not be set aside in an action for plan benefits unless the administrator's decision was arbitrary and capricious.[4]

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[4] Adcock v. Firestone Tire & Rubber Co., ___ F.Supp. ___, No. 3-83-0037 (M.D. Tenn. August 6, 1985); Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir. 1984), cert. denied, ___ U.S. ___, (October 7, 1985); DiCarlo v. Supermarkets General Corp., ___ F.Supp. ___, No. 83 Civ. 8236 (S.D.N.Y. May 31, 1985); Gilbert, et al supra, on appeal in this court, Nos. 85-441 and 85-460; Jung v. FMC Corp., 755 F.2d 708 (9th Cir. 1985); Pabst Brewing Co. v. Anger, 610 F.Supp. 214 (D. Minn.

This standard of review is applied whether the "plan" is an employee pension plan or, as here, an employee welfare benefit plan providing for severance benefits. Sly v. P.R. Mallory & Co., Inc., supra at 1211; Jung v. FMC Corp., No. C82-0018 WAI (N.D. Cal. 1983) at 3. Furthermore, that the administrator is the employer does not alter the standard of review. Id.; see also Rosenthal v. National Life Ins. Co., 486 F.Supp. 1018, 1022 (S.D.N.Y. 1980).

(Footnote 4 Cont.)

1985); Scott v. Gulf Oil Corp., 754 F.2d 1499 (9th Cir. 1985); Miles v. New York State Teamster Conf., 698 F.2d 593 (2d Cir. 1983); Pompano v. Michael Schiavone & Sons, Inc., 680 F.2d 911 (2nd Cir. 1982); Riley v. MEBA Pension Trust, 570 F.2d 406 (2nd Cir. 1977); Van Gunten v. Central States Pension Fund, 672 F.2d 586 (6th Cir. 1982); Peckham v. Board, 653 F.2d 424 (10th Cir. 1981); Horn v. Mullins, 650 F.2d 35 (4th Cir. 1981); Chastain v. Delta Air Lines, Inc., 496 F.Supp. 979 (N.D. Ga. 1980); Taylor v. Bakery & Confectionary Union, 455 F.Supp. 816 (E.D.N.C. 1978); Morse v. Stanley, 566 F.Supp. 1455 (S.D.N.Y. 1983); Rynar v. Ciba Geigy Corp., 560 F.Supp. 619 (N.D. Ill. 1983).

Plaintiffs rely on Struble v. New Jersey Employee Welfare Trust Fund, 732 F.2d 325 (3rd Cir. 1984). The Court of Appeals correctly distinguished Struble, pointing out that the trustees' action in that case affected adversely all potential beneficiaries of the plan.

> Here by contrast one group among many potential beneficiaries of a company plan dispute the denial of their claims and the issue is not, as in Struble, whether the trustee "have sacrificed the interest of the beneficiaries as a class in favor of some third party's interest." [A-35].

Struble involved fund management, not claim eligibility. Likewise Jung, 755 F.2d at 711 distinguished Struble.

Plaintiffs also rely on Blau, supra, arguing that it requires a different standard. We submit the standard was the same but the facts were different. Each case must be considered on its own merits. The court below distinguished Blau on the facts. In Blau, the employer actively concealed its plan from the employees.

Here, every employee was given a general statement and a detailed description was available to every employee upon request. In Blau, the employer never informed its employees of the decision to deny severance. By contrast, Burlington promptly informed the appellants that severance pay was not available under the terms of the policy because their jobs were not eliminated but preserved.

Language of the Plan. Because a plan administrator must interpret the plan in a manner consistent with the plain language of the plan, Miles supra at 599, the starting point in the analysis of Burlington's claims decision is the language of the plan itself.

The plain meaning of Burlington's plan language is that a full-time salaried employee who is "involuntarily terminated from the Company" is eligible to receive severance pay if he is terminated in circumstances involving "job elimination."

Thus there are two conditions of eligibility: "involuntary termination" and "job elimination." Any involuntary termination from Burlington involves loss of a job at Burlington. The second eligibility requirement must therefore refer to something else. Burlington has consistently interpreted the words "job elimination" as referring to the elimination of jobs as such and when jobs are preserved as a result of an organizational change, as here, the mere loss of employment at Burlington has not triggered eligibility for severance pay.

The general rule is that a plan administrator is required to give reasonable effect to all of the words of the plan instrument. Indeed, if the administrator's interpretation has the effect of "render[ing] some provisions of the plan superfluous," the administrator may be deemed to have acted in an arbitrary and capricious manner in violation of ERISA.

Miles, supra at 599. Since Burlington's interpretation of its plan is rational in view of its language, this claims decision was not arbitrary or capricious insofar as the language of the plan is concerned. Indeed, even if there were other rational interpretations of the language of the plan -- interpretations that would have led to a different claims decision in this case -- Burlington's interpretation, being rational and nonarbitrary, should be upheld. Miles, supra, at 599-601.[5]

Decisional Law. The reasonableness of Burlington's interpretation is supported by relevant judicial decisions involving similar plan provisions. Burlington's policy and the language of its plan contain the very elements that were viewed as dispositive by the courts in Jung and

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[5] See also Gordon v. ILWU-PMA Benefit Funds, 616 F.2d 433, 439-40 (9th Cir. 1980); Donaldson v. Hamburg Savings Bank, 568 F.Supp. 897 (E.D.N.Y. 1983) (McLaughlin, J.).

Sly. All three plans (a) required job elimination as a condition of eligibility, (b) were intended as a form of unemployment benefit, and (c) included provisions for the placement of employees who were qualified for severance payments, and were therefore, presumably, without jobs. Moreover, Burlington's plan contained language suggesting that involuntary termination from the company, in and of itself, was not sufficient to trigger severance pay. Thus, Burlington's plan, when read as a whole, presents an even stronger case for the interpretation placed upon it by Burlington than the plans in Jung and Sly.

Purpose of the Plan. As to the subjective intention of management, the record discloses no genuine dispute over the reason or "purpose" behind the adoption of Burlington's severance pay policy: to provide financial support to employees whose jobs are lost through no willful fault of their own and who might

therefore be in need of financial resources during a period of unemployment. The purpose is fully consistent with the common understanding of severance pay:

> "In general, a severance allowance is payment by an employer to an employee on termination of the employee's employment. Black's Law Dictionary, 1232 (5th ed. 1979). Such payment is beyond wages and is usually designed to ease the employee's financial burdens while looking for new employment. See Owens v. Press Publishing Co., 20 N.J. 537, 120 A.2d 442 (1956)." Dhayer v. Weirton Steel, 571 F.Supp. 316 (N.D. W. Va. 1983), aff'd 724 F.2d 406 (4th Cir. 1983), cert. den. 104 S.Ct. 2387 (1984)."

Indeed, it is arguable that the purpose of the program would have been

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See also Petrella v. NL Industries, Inc., 529 F.Supp. 1357, 1361 (D.N.J. 1982) ("Severance pay, which in general is intended to tide an employee over while seeking a new job, certainly could be considered an 'unemployment' benefit"); Younger v. Thomas International Corp., 275 Ark. 327, 629 S.W.2d 294 (1982); In re Brooklyn Citizen, 1 Misc.2d 162, 90 N.Y.S.2d 99, 103 (Sup. Ct. Kings Cty. 1949) ("Severance pay is provided in order to assure a worker whose employment is terminated funds to depend on while he seeks another job.").

undermined if the requirement of "job elimination" had been given the interpretation the plaintiffs wish. Employees whose jobs are not eliminated as a result of an organizational change have a far less forceful claim to the general resources of the company than do employees whose jobs are eliminated. To pay severance to employees who still have jobs would diminish the resources available to all under the general policy.

Where "a rational nexus exists between the purpose of the Plan and [the administrator's] decision," the decision "cannot be deemed arbitrary and capricious." Gordon, supra at 440; Pete v. United Mine Workers of American, etc., 517 F.2d 1274, 1286 (D.C. Cir. 1974).

Burlington's Past Practice. The conclusion that Burlington's interpretation of its plan was reasonable and in accord with its underlying purpose is bolstered

by the company's consistent denial of severance benefits to employees whose jobs were continued with successor companies. In Gordon, supra, the Ninth Circuit held that:

> "Such adherence to a consistent pattern of interpretation is significant evidence that the trustees have not acted arbitrarily."

Id. at 440. In Morse, supra, the district court held that:

> "... defendants' application of this policy to plaintiff was neither arbitrary nor capricious in view of their prior denial of payment to others...."

Id. at 1458. See also Sly, supra at 1211; Jung, supra at 713; Petrella, supra at 1362-63.

In this case, it is clear that since the inception of Burlington's present severance policy in late 1974 the company has consistently applied that policy, in the context of plant and division sales, to bar severance pay to employees who continue in their jobs under new management. To have treated the plaintiffs differently

from their counterparts who were involved in prior plant and division sales, retained their jobs under new management, and were not given severance benefits, would have constituted an improper discrimination between similarly situated participants -- conduct which is prohibited by ERISA. Cf. Petrella, supra at 1362.

ERISA does not require an employer to establish and maintain a severance pay policy or any other kind of welfare benefit plan, and ERISA does not require that such a plan contain any particular provision as to the conditions under which welfare benefits will or will not be paid. Under ERISA, eligibility for welfare benefits is determined solely by the provisions of the plan itself. ERISA requires only that the plan be administered rationally and in accordance with its terms and purposes, whatever they may be.

The Court below held that Burlington's construction of its written plan, giving effect to the eligibility requirement of "job elimination," was "certainly a reasonable one, especially when viewed in light of the goals of the plan." [A-38]

> Under these circumstances, the denial of severance pay benefits to the appellants was not arbitrary and capricious, but was, in fact, a perfectly reasonable interpretation of Burlington's severance pay policy which courts may not replace with an interpretation of their own. LeFebre, 747 F.2d at 204-05. [A-40].

The plaintiffs argued in the abstract in both the district court and the Court of Appeals that severance pay vests and that the benefits accrue to each employee every day.[7] This may be true of pension plans but ERISA distinguishes between pension benefit plans and welfare benefit plans. The latter do not vest and do not require a separate fund or a separate

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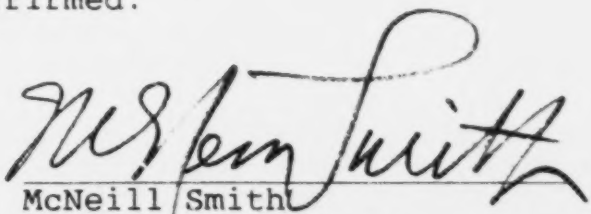
[7] Tr. of Hearing, August 27, 1984, p. 56 and Plaintiffs' Brief in Court of Appeals, p. 40.

trustee. Severance under Burlington's plan and on the facts of this case is wholly contingent requiring both (1) termination of employment with Burlington and (2) job elimination. Both events must occur because the plan calls for both. To disregard either would be arbitrary and capricious, unreasonable and unfair to the thousands of other Burlington employees. When this case is viewed on its facts there has been a full and fair hearing within the company and in the district court. The district court and the Court of Appeals have examined this record in detail and concluded that the plaintiffs have not been denied rights to which they are entitled. The standard of review applied by the courts below insures the achievement of ERISA's purposes on the basis of uniform federal law. Every eligibility determination does not require a trial de novo in Court. The best

procedure is to respect the plan administrator's decision unless it is arbitrary or capricious or in bad faith (as in Blau). The plan administrator has an obligation to all employees, not just to those who make claims when their jobs have not been eliminated.

CONCLUSION

The individual plaintiffs' petition should be denied and the Commissioner's appeal should be dismissed and the judgment below affirmed.



McNeill Smith
Attorney for Appellee and
Respondent

OF COUNSEL:

SMITH MOORE SMITH SCHELL & HUNTER
500 NCNB Building
Post Office Box 21927
Greensboro, North Carolina 27420
Telephone: (919) 378-1450